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Offshore mineral resources:
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Offshore Mineral Resources: Legal Aspects

Margaret Smith

Law and Government Division

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OFFSHORE MINERAL RESOURCES: LEGAL ASPECTS

ISSUE DEFINITION

During the past 40 years, nations have increasingly asserted claims of sovereign rights over their territorial waters and over the resources in the waters and under the seabed of the continental shelf. Many political, economic and technological factors have influenced the evolution of these rights. The desire to exploit the mineral and fishery resources of these maritime areas has encouraged the international community to establish the rights of states over the territory off their shores. For the most part, these rights are not difficult to determine but in the case of federal states it is necessary to decide which level of government has jurisdiction.

The Supreme Court of Canada has been called upon twice to rule upon the question of whether Canada or the provinces have proprietary or exploitation rights in and jurisdiction over the seabed resources of the territorial sea and the continental shelf off the coasts of this country.

In both cases, the Court decided in favour of the federal level of government, attributing to it jurisdiction over and proprietary rights in the seabed, subsoil and resources of the territorial sea of British Columbia and jurisdiction over and exploration and exploitation rights in the continental shelf of Newfoundland.

BACKGROUND AND ANALYSIS

At Confederation, Nova Scotia, New Brunswick, Quebec and Ontario retained ownership of the "Lands, Mines, Minerals, and Royalties" and all "Public Property" then belonging to them; this was embodied

respectively in sections 109, and 117 of the Constitution Act, 1867. This proviso was also made applicable to Prince Edward Island and British Columbia when they joined Canada, while the Constitution Act, 1930 subsequently transferred the same rights to the western provinces. When Newfoundland became part of Canada in 1949, it was put in a similar position by Term 37 of the Terms of Union. Thus there is historical and legal justification for provincial resource ownership; it has been confirmed by section 50 of the Constitution Act, 1982, which adds section 92A to the Constitution Act, 1867. This claim has also led to provincial demand for ownership and control of offshore resource development; i.e., it is the provinces' position that the Constitution Act, 1867 intended natural resources to be within provincial jurisdiction.

Successive federal governments conceded provincial jurisdiction over resources within provincial boundaries, but the question of the limits of those boundaries, the ownership of the seabed resources beneath the territorial sea, and the right to explore and exploit the resources in the continental shelf remained unanswered. These issues were raised (at the request of the provinces) at the 1965 federal-provincial conference, where then Prime Minister Pearson explained that he was willing to enter into an equitable settlement but felt that the jurisdictional issue had to be settled first. As a result he referred the matter of jurisdiction over the offshore of British Columbia to the Supreme Court of Canada (the "Court"). Nova Scotia, New Brunswick, Newfoundland, Ontario and Prince Edward Island were also represented at the hearing.

The Supreme Court's 1967 advisory opinion in Reference Re Offshore Mineral Rights of British Columbia (which is persuasive but not conclusive as regards the other provinces) decided that the territorial seabed was not within the boundaries of British Columbia and thus could not fall under section 109, or be within the sphere of provincial power under section 92 of the Constitution Act, 1867. The Court determined that the boundaries of British Columbia, which had been described on the westerly side as being the "Pacific Ocean," ended at the low water mark.

The Court stated that at common law the British realm stopped at the low water mark. The British courts in the case of R. v. Keyn had found that there was no jurisdiction in the criminal courts to try

a man for manslaughter where the act had been committed within one marine league of the coast; jurisdiction could be exercised over this area only by Parliament, and no such legislation had been enacted. The Supreme Court of Canada noted that the Sovereign (not the colonies) could indeed acquire new territorial rights arising out of international law. It also found that pursuant to R. v. Keyn, the British Parliament had enacted the Territorial Waters Jurisdiction Act of 1878, but that this had not enlarged the British realm and did not deal with the juridical character of the territorial waters or the underlying seabed. When British Columbia joined Confederation in 1871, no proprietary rights in relation to the territorial sea or seabed had been bestowed on that province. The Supreme Court noted that with the Statute of Westminster in 1931 Canada had acquired the status of sovereign state and as such had full constitutional capacity to acquire new jurisdictional rights prevailing in international law. Canada had enacted the Territorial Sea and Fishing Zones Act of 1964 and as result of this and the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone Canada was recognized at international law as having a three-mile territorial sea.* This territory was deemed to be part of Canada, and not of British Columbia.

The 1958 Geneva Convention on the Continental Shelf further defined the rights of the coastal state over the continental shelf for purposes of exploring and exploiting the seabed resources. Although the Convention had already been signed by Canada when the B.C. offshore reference was heard, it had not yet been ratified. Nevertheless, the Court noted that Canada, not British Columbia, would have to answer to claims by the international community for any breaches arising out of the Convention. As with the territorial sea, it was held that the continental shelf lay outside the boundaries of British Columbia. The rights were found to belong to Canada as a whole and to go beyond local or provincial concerns or interests; constitutionally both sets of rights accrued to Canada under the residual powers of section 91 of the Constitution Act, 1867.

* Canada has since claimed a 12-mile territorial sea and a 200-mile fishing zone.

Shortly after the 1967 Supreme Court opinion, it was observed that the terms in which it was couched might still permit the provinces to assert their historic rights over the seabed of the territorial sea and of the continental shelf off their respective shores. Before Confederation, there had been numerous examples of the exercise by provinces of significant rights over the offshore seabed. In considering this, however, it is important to distinguish between inland waters and those of the territorial sea and beyond. In Quebec, the Maritimes and Newfoundland, it would appear that the provinces have exercised considerable jurisdiction over inland waters adjacent to their coasts. (Inland waters are defined as a state's ports, harbours, bays, gulfs, landlocked seas, straits and rivers. Under international law, inland waters are those so closely connected with the territory of the state that they are considered to be dry land).

For example, Gerard La Forest (now of the Supreme Court of Canada) has described Nova Scotia and New Brunswick as having a boundary across the Bay of Fundy, while the boundary between Quebec and New Brunswick is a line through the Baie des Chaleurs. Commissions to various governors of these areas often included the coasts along with all islands within a certain number of leagues of them, as well as "all the rights, members and appurtenances belonging thereto." If these are all to be categorized as inland waters, then it may be that until Confederation most bays belonged to the adjacent provinces, as provided by sections 109 and 117 of the Constitution Act, 1867. (This does not include Hudson Bay which has been conceded to be federal on a number of occasions.)

Moreover, by a 4-2 split decision, on 17 May 1984 the Supreme Court of Canada decided that the waters between the Island of Vancouver and the mainland of British Columbia are part of the inland waters of that province and consequently the soil, the subsoil and the resources they contain are owned by British Columbia. The Court considered that these waters were part of the colony of British Columbia which kept them when it became a Canadian province.

The more difficult problem, at least for the Maritime Provinces and Newfoundland, was whether or not the territorial sea was within the boundaries of those provinces at Confederation. As mentioned above, the Supreme Court of Canada found in 1967 that at the time British Columbia joined the union, the territorial sea was not part of that province. Did the British Crown confer any different rights on any of the other provinces? If one were to follow the reasoning of the Court in the British Columbia case, in particular, as it related to R. v. Keyn and the British Territorial Waters Jurisdiction Act of 1878, it would be difficult to see how Nova Scotia, New Brunswick or Prince Edward Island could succeed in a claim for ownership of the territorial sea or seabed. Nevertheless, the controversy over the decision of R. v. Keyn has certainly raged since it was rendered and it has been both approved and disapproved in Canadian jurisprudence; several earlier decisions in this country indicated that the three-mile territorial sea was within the boundary of the provinces and there can be no doubt that the provinces enacted "hovering" legislation, covering questions of customs and excise within three miles of the coasts or bays. There were even grants for seabed mining off Cape Breton. While it is not possible to predict whether any of these provinces would succeed in their claims, it is nevertheless important that because of their geographical situation and historical development they have always looked to the sea for their livelihood and resources; this view is unlikely to change whatever the outcome of a court decision on the matter, and inevitably provincial pressures will be taken into consideration in any settlement.

After the decision in the B.C. offshore reference, the various provinces concerned began reassessing their positions. In 1977, Prince Edward Island, Nova Scotia and New Brunswick agreed to draft an arrangement with the federal government for the joint development of the offshore. The share in revenue would have been 75% provincial: 25% federal beyond the Mineral Resources Administration Line, which is at least five kilometres from shore. Landward of that line, the provinces would have received 100% of the revenues. A Maritime Offshore Resources Board would have been set up to administer the area seaward of the M.R.A.L., and,

at the option of the province, landward as well. Negotiations on this agreement stopped in 1978 with the provincial election in Nova Scotia.

Newfoundland has constantly maintained that its position differs from that of all the other provinces. Thus, it was unwilling to enter into any settlement at all and was preparing an offshore reference to the Supreme Court on its case prior to the 1979 federal election. When the Conservative government of Joe Clark was elected and promised to transfer ownership of the offshore to the provinces, Newfoundland suspended further negotiations. Following the 1980 federal election and the return to power of the Liberals, Premier Peckford of Newfoundland decided that the issue would be referred to the Supreme Court of Canada. The federal government submitted its own reference on the matter to that Court on 19 May 1982.

The Government of Newfoundland had submitted a similar reference to the Court of Appeal of that province. Its 1983 decision favoured the federal government on the question of the continental shelf. It favoured the Province of Newfoundland, however, on the matter of ownership and exploitation of the territorial sea; notice of appeal of this last decision was filed with the Supreme Court of Canada but neither the Newfoundland and nor the federal government has actively pursued the matter, which is of less importance than jurisdiction over the continental shelf.

In March of 1984, the Supreme Court of Canada rendered its decision on the reference relating to the continental shelf off the Newfoundland coast. In this case, Canada and Newfoundland both claimed rights of a coastal state over the continental shelf recognized by international law. These rights, provided for by Section 2 of the 1958 Geneva Convention on the Continental Shelf, resemble an extension of the sovereignty of coastal states; they are not a form of ownership, but are sovereign rights to explore and exploit the coastal state extending beyond the territory wherein the state exercises its customary authority.

The Court was of the opinion that Newfoundland had to be able to prove: (1) that international law had recognized the existence of rights over the continental shelf before 1949, the year in which Newfoundland entered Confederation; (2) that Newfoundland had been in a position to acquire these rights and; (3) that Newfoundland had not lost the rights as a condition of union with Canada.

The Court first considered the constitutional position of Newfoundland. As a colony with a form of representative and responsible government, Newfoundland had enjoyed only internal self-government and had never had the right to external sovereignty, this being reserved to the British Crown. At the most, incidental extra-territorial effect of a colonial law had been acknowledged where necessary to make its application more effective. In the area of executive power, there had been a similar absence of extra-territorial jurisdiction, which prevented a colony from signing a treaty. A colony, having later become a province, could not then claim the ownership of lands unless they were within its territory; this limitation was clearly set out by jurisprudence.

The adoption of the Statute of Westminster completed the historic evolution of Newfoundland from colony to dominion. At that time Newfoundland might have possessed the external sovereignty necessary to acquire rights over the continental shelf, but the Court was of the opinion that the period between 1934 and 1949, during which the Commission of Government* had existed, had been the critical time for such acquisition to have taken place.

During the life of the Commission of Government, the Newfoundland government was neither representative nor responsible and was virtually under the control of the government of the United Kingdom. In principle, Newfoundland kept its status as a dominion but on the international level was treated differently from the other dominions; the United Kingdom government acted in its name. From this, the Supreme Court of Canada concluded that Newfoundland's external sovereignty had been suspended during that time.

According to the Court, Term 7 of the 1949 Terms of Union with Canada did not revive the constitution of Newfoundland as it had existed before the establishment of the Commission of Government in 1934; it simply returned to Newfoundland, as a province of Canada, a system of responsible government and dealt only with internal self-government.

* At the request of Newfoundland, the British Parliament, in 1933, passed the Newfoundland Act which established the "Commission of Government" in Newfoundland. The Commission of Government gave the U.K. considerable control over the government of Newfoundland and suspended self-government for that colony.

Newfoundland stressed that Term 7 had enabled the province to join Confederation with the same external sovereignty which it had possessed prior to 1934. The Court, on the other hand, was of the opinion that the term had come into force "at the date of Union" and that the re-entry into effect of the former constitution was limited to its new status as the constitution of a province.

The Court was also of the view that Term 37 of the Terms of Union did not enable the province to retain whatever right it might have acquired over the continental shelf before 1949. This term deals with proprietary rights which, by their nature, rights relative to the continental shelf are not. They flow from external sovereignty. After 1949, these rights passed to the entity which possessed external sovereignty, namely Canada. (The Newfoundland Court of Appeal came to the same conclusion with respect to Term 37, but for the reason that Newfoundland had made no claim of a proprietary right. The Supreme Court did not apply this reasoning.) Thus, Term 37 did not give Newfoundland extra-territorial competence.

The Supreme Court went on to consider whether the concept of the continental shelf and the rights exercised over it had existed in 1949. It attempted to determine if the sovereign right ipso jure to explore and exploit the continental shelf had been a matter of settled international law at that time. The Court first studied the claims of states to the continental shelf from 1942 to 1949, including the Truman Proclamation of 1945. It concluded that these claims were not particularly numerous and that their formulation was far from uniform. In 1950, the International Law Commission had concluded that rights over the continental shelf did not form part of international law, a point of view confirmed by the Abu Dhabi Arbitration decision in 1952. The Court therefore concluded that in 1949 international law had not been sufficiently developed to grant coastal states rights over the continental shelf.

Furthermore, the Court refused to accept that such rights could be applied retroactively; that is, to the time before their existence had become recognized in international law. Such an interpretation would date the claims of coastal states over the continental shelf back to the period of its geological formation. The Court based its conclusion on the principle that international law does not attempt to discover rights which

have always existed. Moreover, even if such were the case, the benefiting state would be that with the jurisdiction to acquire rights over the continental shelf; in this case, Canada.

Thus, the Supreme Court of Canada decided that Canada had legislative jurisdiction over rights to the continental shelf by virtue of its residual power to legislate for peace, order and good government. With this came the right of the federal government to explore and exploit the continental shelf off the coast of Newfoundland. The court noted that this right was a case of the extra-territorial exercise of Canada's external sovereignty; the constitutional position of Newfoundland did not confer such rights upon the province and international law had not recognized the existence of these rights in 1949.

On 11 February 1985, the Governments of Canada and Newfoundland signed an agreement on the offshore oil and gas resources off the Newfoundland coast. A joint board, to be called the Canada-Newfoundland Offshore Petroleum Board, was to manage the development of the resources although the federal Minister of Energy, Mines and Resources would have final decision-making powers over the pace and means of exploration and exploitation at any time at which national energy self-sufficiency and security of supply had not been attained. The province would have broad powers of taxation of offshore resource development. Legislation implementing the Canada-Newfoundland Atlantic Accord has been passed by both the Newfoundland legislature and the federal Parliament.

On 26 August 1986 an agreement similar to that signed and implemented with respect to Newfoundland was signed by the Governments of Canada and Nova Scotia. Both the province of Nova Scotia and the federal Parliament have now passed implementing legislation.

CHRONOLOGY

- 1945 - The Truman Proclamation of 28 September stated that the United States regarded the resources of its continental shelf as appertaining to the United States and subject to its jurisdiction and control.

- 1958 - The Geneva Convention on the Continental Shelf was adopted by the United Nations. It provided that the coastal state has sovereign rights to explore the continental shelf and to exploit its resources. The shelf is described as the seabed and subsoil adjacent to the territorial sea, descending either to a depth of 200 metres or to the limit of exploitability.
- 1958 - The Geneva Convention on the Territorial Sea and Contiguous Zone was adopted by the United Nations. Among other things, it provided that a state's sovereignty extended to its territorial sea, as well as the bed and subsoil of that sea.
- 1967 - The Supreme Court held in Reference Re Offshore Mineral Rights of British Columbia that the federal government, not the province of British Columbia, had property rights and jurisdiction over the offshore area.
- 1976 - The British Columbia Court of Appeal held that certain lands underlying Georgia Strait, the Strait of Juan de Fuca, Johnstone Strait, and Queen Charlotte Island belonged to British Columbia.
- February 1977 - Nova Scotia, New Brunswick and Prince Edward Island signed a memorandum of understanding with the federal government for joint administration with a general revenue sharing arrangement to be 75% provincial and 25% federal.
- 5 June 1980 - Bill 61 was adopted on third reading in the Nova Scotia legislature. It provided for control over the exploration and development of petroleum located in Nova Scotia lands and defined such lands as including the seabed and the subsoil of the continental shelf to the limit of its exploitability. It also provided for employment of Nova Scotians on exploitation sites off the shores of Nova Scotia.
- 9 September 1980 - During the constitutional conference the federal government refused to give away its jurisdiction over offshore mineral rights. It offered an administrative agreement to the Maritime Provinces that would have allowed them 100% of the revenues of sales of fuel, natural gas and other minerals until these provinces reached a "have" position. Nine provinces out of ten refused this offer while Ontario reserved its opinion.
- 30 December 1980 - The Canadian Labour Relations Board declined jurisdiction to hear a request from the Seafarers International Union of Canada to be certified as negotiator

for workers on offshore supply vessels in Newfoundland. The Board stated that the forum for such questions was a court. It concurred with the decision of the Newfoundland Labour Relations Board that the latter was constitutionally competent to deal with workers exploiting Newfoundland offshore mineral resources.

- 2 June 1981 - The Minister of Energy of British Columbia, Mr. Bob McClelland, announced that during 1982 his government would open about 49,000 square kilometres of marine waters to oil and gas exploration. This area, said to contain from two to three billion cubic feet of natural gas, included Hecate Strait, Dixon Entrance, Queen Charlotte Sound and Strait, Johnstone Strait, the Strait of Georgia and the Strait of Juan de Fuca. British Columbia considered that this area was under provincial jurisdiction in keeping with the 1976 decision of the Appeal Court of the province.
- 27 July 1981 - Prime Minister Trudeau invited the premiers of Newfoundland and Nova Scotia to negotiate an agreement on the management and revenue sharing of offshore mineral resources. He cited the federal jurisdiction awarded in the 1967 Supreme Court decision affecting British Columbia and stated that tribunals would have to solve this problem of jurisdiction. In the meantime he wished establish a joint administrative mechanism. As for revenue-sharing, he proposed to Newfoundland that offshore resources would be treated as though they were on land as long as this province remained a have-not province. The Minister of Justice sent a telegram for the same purpose to the Minister of Inter-governmental Affairs of British Columbia. He indicated that his Department would appeal to the Supreme Court of Canada the British Columbia Court of Appeal's 1976 judgment on the Strait of Georgia.
- 2 March 1982 - The governments of Canada and Nova Scotia signed an agreement relating to the exploitation of that province's offshore mineral resources. The Canadian government would control their development while Nova Scotia would receive most of the resulting revenues until it reached a level of fiscal and economic capacity above the national average. The question of ownership of these resources was not covered by this agreement.
- 5 March 1982 - The Appellate Division of the Federal Court decided that the Government of Canada, under its power over shipping, had jurisdiction over labour relations aboard vessels supplying drilling rigs off Canada's

coast. Consequently, it referred the application for certification made by the Seafarers International Union back to the Canada Labour Relations Board. The Court refused to decide on the issue of ownership of offshore mineral resources. On 10 May, the Supreme Court of Canada refused to hear an appeal of this decision.

- 16 March 1982 - The Premier of Newfoundland unveiled proposals on the offshore resources of his province presented to the federal government on 25 January. They covered five main subjects: implementation of economic programs advantageous to Newfoundland, joint management of the resources, a revenue-sharing formula, an equal sharing of Crown rights between Petro Canada and Newfoundland's Crown corporation and entrenchment under section 43 of the new Constitution Act, 1982 of any agreement on the offshore resources.
- 6 April 1982 - The Conservative Party of Brian Peckford won the general election in the Province of Newfoundland. He had called an election seeking a mandate to negotiate the ownership of offshore mineral resources of this province with Ottawa.
- 19 May 1982 - By P.C. 1982-1509, the federal government decided to refer to the Supreme Court the question of ownership of resources in the Hibernia area off the coast of Newfoundland. In a letter to Mr. Peckford, the Prime Minister declared that he had taken this step because it had proved impossible to reach an agreement with Newfoundland. Mr. Peckford protested against this unilateral federal action while a similar matter was before the Newfoundland courts.
- 17 February 1983 - A Newfoundland Court of Appeal decision recognized that the province had a constitutional status allowing it to acquire the ownership of and jurisdiction over the territorial sea by virtue of international law. But the Court did not recognize the rights of Newfoundland over the resources of the continental shelf off its coast.
- March 1984 - The Supreme Court of Canada unanimously ruled that the federal government had the right to explore for and exploit the mineral and other natural resources in the seabed of the continental shelf off the coast of Newfoundland.
- 17 May 1984 - By a 4-2 split decision, the Supreme Court of Canada awarded to the province of British Columbia ownership of the lands and natural resources of the soil and subsoil under the waters between the Island of

Vancouver and the mainland of British Columbia. This decision confirmed the ruling of that province's Court of Appeal.

- June 1984 - Royal Assent was given to the Canada-Nova Scotia Oil and Gas Agreement Act, S.C. 1984, c. 29, and the Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act, S.N.S. 1984, c. 2. These statutes implemented the agreement dated 2 March 1982 between Canada and Nova Scotia respecting the exploitation of Nova Scotia's offshore mineral resources.
- 14 June 1984 - Conservative leader Brian Mulroney, announced his policy on the offshore resources of Newfoundland. It provided for nomination of an independent chairman for the resource management board. Newfoundland would be allowed to collect revenues from these resources as if they were based on land. The federal government would then reduce its equalization payment to Newfoundland by 10%.
- 11 February 1985 - The Governments of Canada and Newfoundland signed an agreement, the Atlantic Accord, on the development of hydrocarbon resources off the coast of Newfoundland. A jointly appointed Canada-Newfoundland Offshore Petroleum Board would be established to manage the development. The province would have the right to levy taxes on offshore resource activity.
- 21 May 1986 - Bill C-92, The Canada Petroleum Resources Act, which would, among other things, have regulated offshore petroleum exploration in the absence of a specific federal-provincial agreement, received second reading. This bill died on the Order Paper with the prorogation of Parliament in August 1986.
- 26 May 1986 - Bill C-94, The Canada-Newfoundland Atlantic Accord Implementation Act, which would have implemented the terms of the agreement entered into by Canada and Newfoundland on 11 February 1985, received second reading. This bill died on the Order Paper with the prorogation of Parliament in August 1986.
- 26 August 1986 - The Governments of Canada and Nova Scotia signed an agreement to replace that of 1982 relating to the exploitation of offshore mineral resources. The new agreement would allow Nova Scotia to participate equally in the management of offshore petroleum development and would alter certain aspects of the federal-provincial fiscal scheme respecting the Nova Scotia offshore.

- 18 November 1986 - Bill C-5, The Canada Petroleum Resources Act, which, among other things, regulates offshore petroleum exploration in the absence of a specific federal-provincial agreement, received Royal Assent. It was to come into force upon proclamation except for section 116, which was deemed to have come into force on 5 March 1982.
- 15 February 1987 - Certain provisions of the Canada Petroleum Resources Act [Sections 1-3, Parts I-VII, IX, X, except for frontier lands in Nova Scotia, Newfoundland, and the Northwest Territories] were proclaimed in force.
- 4 April 1987 - The Canada-Newfoundland Atlantic Accord Implementation Act, implementing the terms of the agreement entered into by Canada and Newfoundland on 11 February 1985, was proclaimed in force except for Division VIII of Part II (transfers, assignments and registration), sections 207 and 208 relating to certain taxes and Part VII relating to corporate income tax.
- 1 December 1987 - Sections 1 to 3 and Parts I to VII, IX, and X of the Canada Petroleum Resources Act came into force with respect to certain frontier lands (the Fort Good Hope area of the Northwest Territories).
- 28 April 1988 - Part VIII of the Canada Petroleum Resources Act, except for its application to offshore areas, was proclaimed in force.
- 20 May 1988 - Division VIII of Part II of the Canada-Newfoundland Atlantic Accord Implementation Act was proclaimed in force.
- 21 July 1988 - Bill C-75, the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, implementing the terms of the agreement entered into by the governments of Canada and Nova Scotia on 26 August 1986, received Royal Assent. It will come into force upon proclamation.

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